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No. 89-543

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

CHARLES N. SLAYTON,

Petitioner,

vs.

BECHTEL POWER CORPORATION; SOUTHERN CALIFORNIA EDISON COMPANY, A Corporation; BECHTEL CONSTRUCTION COMPANY, INC.,

Respondents.

On Appeal from the Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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QUESTIONS PRESENTED

A.

In a case wherein the issues presented to the state court on appellate review in effect draw into question the federal question of the constitutionality of a statute permitting the trial judge to grant judgment notwithstanding the verdict as

being repugnant to the Seventh Amendment of the United States Constitution as is the case here, does the United States Supreme Court have jurisdiction to decide from the record and an examination thereof, whether or not the federal question has been presented to the state courts and necessarily passed upon?

B.

In a case where a duly constituted jury to which a complete state court trial has been presented, has decided that the evidence presented to it under instructions by the court, is sufficient to sustain the plaintiff's burden of proving that a defendant employer wrongfully discharged the plaintiff employee without reasonable cause and by the use of sham and pretext sufficient to constitute bad faith, is the state trial court's reversal of the jury verdict awarding damages to the plaintiff

employee and punitive damages for the exhibition of bad faith by said employer, under the California state statute authorizing trial courts to grant judgments notwithstanding the verdict [California Code of Civil Procedure §629], a violation of the Seventh Amendment to the United States Constitution and consequently the kind of plain constitutional error that this Court can and should correct?

C.

In a case where the trial judge has granted both judgment notwithstanding the verdict and in the alternative a new trial under California Code of Civil Procedure §§629 and 659 respectively, to an employer defendant, after a jury verdict in favor of plaintiff employee, may the Court of Appeal of the State of California and the Supreme Court of the State of California affirm the trial court's order granting judgment

notwithstanding the verdict to the employer defendant without considering or passing upon the trial court's alternative granting of said employer's motion for new trial where the jury verdict has been in favor of the plaintiff employee based upon the evidence that the employer has wrongfully discharged the employee through the use of bad faith, sham and pretext as determined from the evidence submitted to the jury?

D.

Is the question of the constitutional vitality and validity of Section 629 of the California Code of Civil Procedure, as applied in this case by the trial court, the Court of Appeals, and the Supreme Court of the State of California, of sufficient substantiality to warrant this Court to exercise its jurisdiction in reviewing the matter on the granting of this requested Writ of Certiorari?

E.

In a case where the jury has awarded contract damages and bad faith damages in a wrongful discharge situation such as is present in this case and has also awarded punitive damages for violation of the covenant of good faith and fair dealing which the California Supreme Court has declared is a covenant of every contract made in the State of California [in Seaman's Direct Buying Service Inc. v. Standard Oil Co., 36 Cal.3d 752, 768, 206 Cal. Rptr. 354, 362 (1983)], does the California Supreme Court holding in Foley v. Interactive Data Corp. at 47 Cal.3d 654, 254 Cal. Rptr. 211 (1988), to the effect that the only damages available for a breach of the covenant of good faith and fair dealing in an employment case only are limited to contract remedies thus eliminating tort damages in wrongful

discharge cases involving sham, pretext and violations of the covenant of good faith and fair dealing as in this case with the exception of certain cases involving a protection of public rights under public policy, a violation of the Fifth and Fourteenth Amendments to the United States Constitution?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED.

[Rule 21(b), Rules of the United States Supreme Court.]

The list of all parties to the proceeding in this Court whose judgment is sought to be reviewed are:

1. Charles N. Slayton.
2. Bechtel Power Corporation.
3. Bechtel Construction Inc.

28 U.S.C. §2403(b) may be applicable and this document is concurrently herewith being served upon the Attorney General of the State of California.

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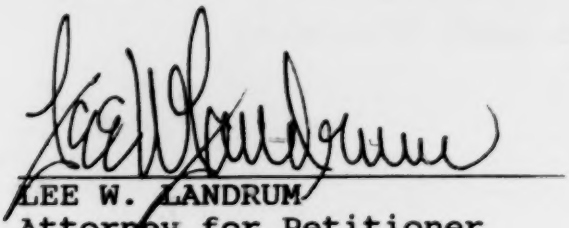
CERTIFICATION TO THE ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA

I CERTIFY TO THE ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA THAT THE CONSTITUTIONALITY OF THE STATUTE SET FORTH IN CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 629 IS HEREIN DRAWN INTO QUESTION.



LEE W. LANDRUM
Attorney for Petitioner

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OPINION BELOW, APPROVED BY CALIFORNIA SUPREME COURT

The Opinion of the Court of Appeal, approved by the California Supreme Court was certified by the intermediate appellate court of that state for non-publication; however, a copy is attached to the Appendix as Appendix B for this Court's

convenience. The California Supreme Court's approval of said Opinion is attached to the appendix as Appendix A, i.e., that Court's denial of this petitioner's request for review.

JURISDICTION

Petitioner, CHARLES N. SLAYTON, respectfully prays that a Writ of Certiorari be issued to review the refusal of the California Supreme Court to review the Opinion of the Court of Appeal, Fourth Appellate District, Division One, of the State of California, filed on May 3, 1989. That refusal affirmed the Opinion of the said Court of Appeal which had affirmed the trial court's granting of respondent's motion for judgment notwithstanding the verdict and new trial, after a jury verdict had been rendered in the trial court in favor of CHARLES N. SLAYTON, petitioner here and plaintiff therein, against BECHTEL POWER CORPORATION, respondent here

and defendant therein, CHARLES N. SLAYTON sued BECHTEL POWER CORPORATION for breach of employment contract and breach of the covenant of good faith and fair dealing and received a $1,052,331.00 jury verdict which included $600,000.00 for punitive damages, after the case had been submitted to the jury and the jury had been fully instructed by the court.

The trial court in San Diego County had granted the defendant's motion for judgment notwithstanding the verdict, under California Code of Civil Procedure §629, and for new trial under California Code of Civil Procedure §659, and SLAYTON appealed in the California Court of Appeal, Fourth District, from those orders. The State Court of Appeal held:

> "Because there is no substantial evidence Bechtel wrongfully terminated Slayton so as to support the jury verdict, we affirm the judgment notwithstanding the verdict and need not address the grant of new trial. (Code Civ. Proc.,

[Section] 629.)" [See Appendix B, page 1.]

Thereupon, petitioner requested the California Supreme Court to review the Opinion of the Court of Appeal, and said request was officially denied on May 3, 1989. [See Appendix A.]

Petitioner now asks this Court to review the refusal of the Supreme Court of the State of California to review the Opinion of the Court of Appeal of that state, assuming that under this Court's holding in Minneapolis S.T.P.&S.Ste. M.R.Co. v. Rock (1929) 279 U.S. 410, 412, 49 S.Ct. 363, 73 L.Ed. 766, the refusal of the highest state court to review a decision of a lower court may be considered an approval of the conclusion reached by the lower court and is in effect an affirmance of the lower court's judgment.

Since the basic ingredient of this petition to this Court is the question of the constitutional validity of Section 629

of the California Code of Civil Procedure as used by the Court of Appeal of the State of California and the Supreme Court of the State of California in denying petitioner his right to a civil jury trial under the Seventh Amendment to the United States Constitution, it is respectfully submitted that this Court has jurisdiction to issue its Writ of Certiorari by reason of 28 U.S.C. §1257.

The California Court of Appeal's Opinion was filed on February 16, 1989. On March 22, 1989, petitioner timely filed a Petition for Review of the Opinion with the California Supreme Court, the highest court of review in the state. Thereafter, on May 3, 1989, the California Supreme Court In Bank issued and filed its Order Denying Review After Judgment by the Court of Appeal, Fourth District, Division One, as set forth in the appendices hereto. This petition is being filed within the time

permitted by 28 U.S.C. §§2101, 2104. This Court has jurisdiction to review the refusal of the California Supreme Court to grant review of the Opinion of the California Court of Appeal by Writ of Certiorari pursuant to 28 U.S.C. §§1254 and 1257; and Minneapolis S.T.P.&S.Ste., M.R. Co. v. Rock, (supra.).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Right to Jury Trial in a Civil Case Amendment, U.S. Constitution, Seventh Amendment (Appendix C) - Fifth and Fourteenth Amendments to the United States Constitution.

CALIFORNIA COURT OF APPEALS (APPENDIX B) STATEMENT OF THE CASE

The defendant BECHTEL POWER CORPORATION ("BECHTEL") was a general contractor for SOUTHERN CALIFORNIA EDISON COMPANY ("EDISON"), a licensee of the San Onofre Nuclear Power Plan in Southern California.

The BECHTEL management hierarchy pertinent to this case was Edward Molnar, vice-president and manager of construction, Dick George, project superintendent, and petitioner SLAYTON, swing-shift (or night-shift) superintendent. Under SLAYTON were the general foreman, Charles Cazares, followed by welding foreman, William Steven Vealey.

San Onofre, Unit One, known as SONGS I, where the incidents involved in this case occurred, was shut down from February of 1982 to November of 1984 for the purpose of upgrade. BECHTEL and EDISON were working on the plant during a "return-to-service" outage to return the plant to restarting standards required by both the California Public Utilities Commission and the Nuclear Regulatory Commission.

One of BECHTEL's working procedures required a welder to mark his identification number, known as a "P"

number adjacent to a weld that he or she had done. This was a temporary identification and the permanent record was in various written documents including one termed a "WR6" form, which had to be filled out by the welder when drawing materials from the supply room to make a weld before the welder attempted to do so. In this way the supply room attendants could check the qualifications of any welder to the work proposed, before the actual work was done, and provided a permanent record as to the identity of the person who did a particular weld as well as where the weld was to be situated. The record also contained a full description of the type of material issued, used, and where it was placed, and how much of it was used, as well as the time.

The term "buying off" a weld refers to the process of accepting or rejecting it by a quality inspector. When a weld was finished, the inspector would visualize it

for its compliance to pre-set standards. After the complete inspection and verification of the information concerning the weld, it was painted over and the "P" number adjacent to it was obliterated, leaving only the written record of the weld.

SLAYTON, on a career track with BECHTEL for fourteen continuous years during which he had worked himself up from an electrician's apprentice on a $900.00 per month salary to a superintendent on a $54,000.00 per annum salary, with constant commendation from his superiors for doing exemplary and outstanding work for his employer and his employer's customers such as SOUTHERN CALIFORNIA EDISON COMPANY, on August 5, 1984, was given a welding package from the welding inspector consisting of a folder with a sticker-type note stating "Welds O.K. -- needs 'P' number." SLAYTON gave the package to general foreman

Cazares, and told him to take welding foreman Vealey with him to the rod room (supply room aforementioned) to determine who had drawn welding rods for that particular weld. The pair were unable (so they said to SLAYTON, to find the welding record.) SLAYTON told them to try again and make verification with the rod-room attendants. They again reported to SLAYTON that they were unable to find the identification of the welder. SLAYTON, under the pressure of time and a schedule to be met so that SONGS I could get back on line without penalty to his employer, then requested Vealey to inspect the weld, and, if the workmanship and criteria for passing the weld were compatible with his own, to place his "P" number on it, while they attempted to further find the written record.

Unknown to SLAYTON and without SLAYTON's authority, Vealey drew rod

material from the rod-room as though he were going to do the weld himself. He trashed the rods, and made a new written record on a WR6 form showing his own "P" number and then put that "P" number on the subject weld, as though he had done it. He told Cazares, but did not tell SLAYTON that this would validate the whole procedure. Cazares testified that because Vealey had been a welder for BECHTEL for a long time, he depended upon Vealey and his expertise in handling the matter, and told SLAYTON nothing about his agreement and conversation with Vealey. The weld was inspected and accepted without change except for the addition of Vealey's "P" number.

SLAYTON in the meantime, since July of 1984, had been dissatisfied with Vealey's overall performance, and on August 8th, reduced him from foreman to journeyman after a line rupture occurred in a weld

Vealey had failed to inspect. This was without knowing that Vealey had falsified the welding rod-room papers (i.e. the WR6 form) to reflect that he had performed the weld in question. The Appellate Court also found that Cazares and the rod-room attendants all knew that Vealey was falsifying the weld papers, but said nothing to SLAYTON about it. SLAYTON, of course, according to the Appellate Court Opinion, did not know Vealey had falsified the papers, and he had not told Vealey to do so.

After SLAYTON had reduced Vealey from foreman to journeyman for reasons not connected to Vealey's falsification of records since SLAYTON had no knowledge of same at the time, Vealey threatened SLAYTON that if he was not reinstated as a foreman he would place a complaint (he did not state for what) in the "NRC drop box." Angered by this attempt at blackmail,

SLAYTON put Vealey on the lay-off list, and on August 10, 1984, Vealey was laid off based on a reduction in force. Project superintendent George testified that he had instructed SLAYTON to reduce Vealey to a journeyman and then lay him off because of Vealey's failure to inspect a weld previous to this incident, after SLAYTON had told him (George) of Vealey's previous conduct.

Vealey, after the lay-off, wrote a complaint to the NRC and copy to BECHTEL and EDISON stating the UNTRUTH that he was ordered to falsify the rod-room records by SLAYTON and that he didn't want to be prosecuted for falsification of documentation relating to welding. The Court of Appeal relates this complaint as follows:

> "... On August 10, Vealey submitted a nuclear safety concern which described the 'P' number incident as follows. When they could not find the rod papers to identify the welder, he jokingly said to his supervisor [Cazares],

'I can draw rod on the pipe support number and even though I won't weld I will then put my welder's identification number on it'; nothing more was said at that time. A few hours later he stopped to speak with Slayton, and was told to go ahead with what his supervisor and he had spoken about earlier. Vealey asked Slayton if Slayton knew what he was talking about, and Slayton said it was an opportunity to get an easy completion. Vealey did what he was ordered to do; he went into the rod room and filled out a WR6 for the weld signed by himself for rod he did not weld; turned the rod back in; and then went into containment to put his welder's identification number on the support even though he had not welded. What came to his mind was that the NRC has prosecuted people for falsification of documentation relating to welding; and he did not want this to happen to him, as he was only following orders, and there have been numerous improprieties perpetrated in the name of production." [Appendix B, pages 7 and 8.]

On August 14, 1984, SLAYTON was relieved of his duties pending an investigation of Vealey's allegations. An investigation was conducted by BECHTEL and a report dated September 11, 1984 summarized the investigation and its

resolution, including the following items of information:

1. Vealey volunteered to draw rod and put his identification number on the weld.

2. SLAYTON admitted he asked Vealey to inspect the weld and if it was acceptable under the criteria of himself and BECHTEL, to put his "P" number on it, but Vealey withdrew the weld rod on his own.

3. On August 17, 1984, all swing shift foremen were interviewed to see if there was pressure from supervision that would compromise quality of work or accuracy of records, and none was reported.

4. On August 18, 1984, a follow-up interview was conducted with Vealey regarding two other improprieties he had alleged, which, after investigation, were found to be unsubstantiated.

5. On August 28, 1984, the weld papers for the true welder were found, and

on August 31, 1984, the welding documentation corrected. In this regard, the Court of Appeal opinion states in footnote at page 10 [Appendix B]:

> "An inspection report prepared in response to quality assurance instructions to void Vealey's 'P' number mark indicates his number was not in fact marked on the weld, but rather the correct 'P' number was already there. Vealey testified, however, he did place his number on the weld. Molnar, who made the decision to fire Slayton, testified even if he had known Vealey's 'P' number had not actually been placed on the weld, it would not have influenced his decision to fire Slayton."

On August 31, 1984, management met with Vealey to review the results of the investigation of his allegations and to offer him re-employment.

At trial, Molnar testified Vealey was rehired because of concerns for his status as a whistleblower; and SLAYTON was fired because he directed Vealey to place his "P" number on a weld he did not do in violation

of a well-established procedure known to SLAYTON.

The rod room engineers were not terminated as a result of their knowledge of the incident with Vealey. General foreman Cazares was demoted to a journeyman.

On December 21, 1984, Vealey was again laid off for a reduction in force. When he was laid off, Vealey again threatened to go to the NRC based on his claim he was being laid off in retaliation for his whistleblowing in August. BECHTEL made its decision to resolve the ensuing legal dispute and avoid extended litigation by paying Vealey a cash settlement.

The Court of Appeal exhaustively re-examined in minute detail the entire record of evidence submitted to the jury in the underlying civil trial and determined that in actuality the evidence submitted in this trial of seven and one-half weeks of

testimony was not of such substantiality as to warrant the jury in finding for the plaintiff and against the defendant BECHTEL, even though BECHTEL did not dispute that there was sufficient evidence to support a jury finding there was an agreement that SLAYTON, an employee with a long and largely satisfactory work history and on a career track with BECHTEL, would not be terminated except for good cause. BECHTEL terminated SLAYTON for "MISCONDUCT" in falsifying company welding documents [see Appendix B, pages 10, 26 and 27], knowing that Vealey and not SLAYTON had originated the falsification of same.

The jury was fully instructed by the trial court and neither petitioner nor respondent questioned the adequacy or the correctness of the instructions in the appeals in the state courts.

The findings by the Court of Appeal in its re-examination of the facts, contrary

to the edict contained in the Seventh Amendment to the Constitution of the United States contains, among other statements, the following revealing inference which the jury of necessity must have drawn in reaching its own decision in this case, are most impactive when placed in the context of pointing up the constitutional invalidity of the California Code of Civil Procedure §629, set forth in Appendix D hereto attached:

> "... Regarding the merits of the decision to terminate Slayton, the record can support an inference that from an engineering/safety perspective his procedural violation was a minor one, but Bechtel management wanted this conclusion suppressed so that it could not be used to challenge Slayton's termination, since it needed to fire someone for 'political reasons' (i.e., based on Maisu's testimony, plus George's statement the matter was political). That is, Bechtel could have wanted to make a showing to Edison and/or the NRC that it was strict on safety so as to avoid further investigations and interference with its operations. The inference could be drawn that if not for political

> pressure to have a safe nuclear power plant, Bechtel would not have felt the need to issue the drastic sanction of termination for what could be perceived as a minor procedural violation."

Under the instructions by the trial court, the jury by its verdict in favor of the plaintiff who is the petitioner here examined the voluminous facts presented in this seven and a half week trial and determined that there had indeed been a wrongful discharge, breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, and breach of contract concerning the implied contract between SLAYTON, the employee, and BECHTEL, the employer, in the discharge of SLAYTON without good cause. We are here concerned with whether or not the trial court's, the Court of Appeal's, and the Supreme Court's decisions in this California case, re-examining the facts found to be true by the jury, and their decision based upon the law as instructed

by the trial judge, under the auspices of California Code of Civil Procedure §§629 [Appendix D] and 659 [Appendix E] is an unconstitutional application of constitutional statutes or is an application of an unconstitutional statute. We are also concerned with whether or not the recent California case entitled Foley v. Interactive Data Corp. at 47 Cal.3d 654, 254 Cal. Rptr. 211 is in and of itself an unconstitutional holding in that it violates both the Fifth and Fourteenth Amendments to the United States Constitution. The reason we are concerned with Foley is that in the event this Court grants its Writ of Certiorari as herein prayed it will be concerned with that portion of the verdict that was set aside as above set forth which awards $600,000.00 in punitive damages for the violation of the covenant of good faith and fair dealing which has been held by the California

Supreme Court to be present in every case in California -- that is except in employment contracts as held by Foley.

A brief history of Foley is necessary here. In that case the California Supreme Court rendered its decision filed on December 29, 1988. The opinion was concerned in the employment law field and particularly with the issue of wrongful discharge. The majority reversed Cleary v. American Airlines Inc. (1980) 111 Cal. App. 3d 443, holding that the damages available for a breach of the covenant of good faith and fair dealing in employment cases are limited to contract remedies. This eliminates tort damages in most wrongful discharge cases in the State of California.

The Foley Court upheld an employee's right to bring lawsuits for breach of implied and express contracts such as those involved in this case endorsing the rationale of the California case of Pugh v.

See's Candies Inc. (1981) 116 Cal. App. 3d 311. The Court stated that traditional contract principles will be applied in these particular cases but not in other cases which do not involve an employment-employer-employee relationship. The decision leaves intact the rights established in Tameny v. Atlantic Richfield Corporation (1980) 27 Cal. 3d 167, allowing employees to recover tort damages for terminations in violation of public policy; however the public policy must have been established to protect "public" versus "private" rights. A seemingly discriminatory decision and one which of course violates both the Fifth and the Fourteenth Amendments of the United States Constitution with reference to due process and discrimination. The Court also held in the Foley case that the statute of frauds does not bar oral contract claims.

It is not an invisible fact that this Foley decision is crucial to any employee and any lawyer practicing in the employment law arena.

REASONS FOR GRANTING THE WRIT

1. The case here involves issues presented to the State Court on Appellate review which in effect draw into question the federal question of the constitutionality of a statute permitting the trial judge to grant judgment notwithstanding the verdict as being repugnant to the Seventh Amendment to the United States Constitution and thus authorizes the United States Supreme Court to decide from the record and an examination thereof whether or not a federal question has been presented to the State Courts and necessarily passed upon.

2. The case here involves a verdict reached by a duly constituted state jury in state court wherein they have decided from

the evidence presented in the trial of this matter and under the instructions by the court that plaintiff has sustained his burden of proving that a defendant employer wrongfully discharged the plaintiff employee without reasonable cause and by the use of sham and pretext sufficient to constitute bad faith, and the Judge's reversal of that jury verdict awarding damages to the plaintiff employee under the California state statute authorizing trial courts to grant judgments notwithstanding the verdict, which is contended herein to be a violation of the Seventh Amendment to the United States Constitution and consequently the kind of plain constitutional error that this Court can and should correct.

3. In this case a trial judge has granted both judgment notwithstanding the verdict and in the alternative, a new trial, to an employer defendant after a

jury verdict in favor of plaintiff employee, and the Court of Appeals [the intermediate Appellate Court] of the State of California, and the Supreme Court of the State of California have affirmed the trial court's order granting judgment notwithstanding the verdict to the employer defendant after completely reviewing and taking into consideration all of the evidence that the jury had used to determine its verdict including evidence in favor of the plaintiff employee and evidence in favor of the defendant employer, and has decided that the trial court was correct in reversing the jury verdict which had been based upon evidence that the employer had wrongfully discharged the employee through the use of bad faith, sham and pretext as determined from the evidence submitted to the jury.

4. This case involves the question of the constitutional validity of Section 629

of the California Code of Civil Procedure by providing the basis for the trial court's granting of judgment notwithstanding the verdict as shown on the record of this case, and as contended herein to be violative of the Seventh Amendment to the United States Constitution and of sufficient substantiality to warrant this Court to exercise its jurisdiction in reviewing the matter on the granting of this requested Writ of Certiorari.

ARGUMENT UNIVERSAL TO ALL QUESTIONS IN THIS PETITION FOR WRIT

The basic premise upon which this Petition for Writ of Certiorari is directed to this Court, is that it becomes obvious that the application of the right of the trial court to destroy a duly rendered jury verdict in a wrongful discharge case such as the one at bar, through the application of the "thirteenth juror" designation granted it by Section 629 of the California Code of Civil Procedure is unconstitutional

in view of the Seventh Amendment to the United States Constitution.

The tenets of Section 629 of the California Code of Civil Procedure have definitely been brought into actual or threatened operation on the rights of this petitioner. This petitioner has been aggrieved by the trial court's application of its so-called right to vacate the judgment and verdict rendered in favor of the plaintiff because it disagreed with the jury's interpretation of the evidence presented to it and thus contains the substance of which this Court should take cognizance in exercising its appellate jurisdiction of that decision by the trial court, the Court of Appeals of the State of California, and the Supreme Court of the State of California. True, this Court has no right to pronounce an abstract opinion on the constitutionality of a state law. However such law must be brought into

actual or threatened operation on the rights of the individual aggrieved in order to properly fall under judicial cognizance of this Court. This Petition for Writ of Certiorari is at the instance of one who is himself immediately harmed or immediately threatened with harm by the challenged action.

The state court's decision as to whether or not it could exercise the powers given it under the so-called interpretation of California Code of Civil Procedure §629 obviously was necessary to the determination of this cause. It then presents a federal question since the United States Supreme Court must decide whether it has jurisdiction in a particular case and must determine whether the federal question was necessarily passed on by the state court. The state courts could not have rendered the decisions they rendered unless they necessarily passed on the

constitutionality of the statute under which they rendered such decisions. This Court in examining the record will so determine. The conduct of each of the state courts involved in this matter has in effect drawn into question the federal question as to the constitutionality of the statute permitting judgment notwithstanding the verdict as being unconstitutional in that it is repugnant to the Seventh Amendment to the United States Constitution as is the case here. The United States Court must decide from the record and an examination thereof whether or not that federal question had been presented to the Court and necessarily passed upon, either directly or indirectly. [Honeyman v. Hannan (1937) 300 U.S. 14, 18-19, 57 S.Ct. 350, 81 L.Ed. 476.]

It is a substantial question to investigate the petitioner's right to a jury trial and the circumscription of that

jury trial verdict by the decisions of the state courts granting judgment notwithstanding the verdict as being an unconstitutional application of California Code of Civil Procedure §629 with reference to the granting of judgment notwithstanding the verdict and an unconstitutional application of Section 659 of the California Code of Civil Procedure wherein the alternative judgment was granted, i.e., a refusal to decide whether or not Mr. SLAYTON was entitled to a new trial after the trial court had granted new trial in the alternative to the defendant employer herein. [Pederson v. Delaware, etc. Railway Co., 57 L.Ed. 1125, 229 U.S. 146, 33 S.Ct. 648 (1913).] The Pederson case is most important in that it is to the effect that a federal court cannot consistently with the provisions of the Seventh Amendment to the United States Constitution preserving the right of trial

by jury, enter judgment for the defendant notwithstanding a verdict for the plaintiff on the ground that the latter was not sustained by the evidence -- if this is true for the federal court it certainly should be true for the state court. Pacific West Cable Company v. City of Sacramento, California (1987) 672 F.Supp. 1322, holds that the Seventh Amendment to the United States Constitution requires that if there is a view of the case that makes the jury's answers consistent, the Court must adopt that view and enter judgment accordingly. In that case, a cable system operator brought suit against municipal corporations alleging that the defendants' refusal to issue it a franchise violated its constitutional rights and anti-trust laws. The Court submitted special verdicts to the jury and after the special verdicts were rendered, the Court held that (1) the government's interests

were not sufficiently substantial to justify government created artificial monopolies; (2) the operator was entitled to declaratory judgment establishing that municipal corporation's single franchising policy violated the cable operator's First Amendment rights; and (3) the operator was entitled to injunctive relief with respect to its request for permission to build and operate its cable television system. Among other things, the jury in said case concluded that cable television is not naturally a monopoly, and that there should be head-to-head competition. It further concluded that the governing authority in granting a single cable television franchise used the question of necessary monopoly as justification and that same was sham or pretext for granting a single cable television franchise just as in our case the jury concluded that SLAYTON had been fired for a motive that constituted sham or

pretext in that the motive obviously was that (1) BECHTEL CORPORATION wanted to give the political inference that it was concerned with safety in a nuclear generating station project to the government officials regulating same (the NRC); and (2) that BECHTEL wanted to appease Vealey for one reason or another. [See Court of Appeals' Opinion, Appendix B hereto, pgs. 31-38.] It should be noted that in the Pacific case the jury also concluded that the sham and pretext justification above alluded to was used to obtain increased campaign contributions for local elected officials [just as the sham and pretext justification for the firing of SLAYTON was found by the Court of Appeals to be a "political" motivation to impress the NRC and government officials that BECHTEL was completely interested in safety and that that was the reason why BECHTEL wanted to carry on its own investigation of

SLAYTON when in reality it carried on its own investigation in order to appease Vealey and to warrant the escalation of the offense that SLAYTON purportedly had committed from a minor violation not involved with safety to one of major proportions warranting good cause for the firing of SLAYTON]. [See Court of Appeals' Opinion, Appendix B, pgs. 25, 26-28.]

This petitioner must in all good conscience quote from the Court of Appeals' opinion in this regard. It is as follows:

> "We must determine if there is substantial evidence to support the jury's verdict which includes an award of punitive damages. ¶ First we evaluate whether there is any solid evidence of pretext so as to support the jury's verdict of wrongful termination based on lack of good cause ..."

Here the Appellate Court in one instance uses the word "substantial" to indicate its responsibility. Then they immediately embark upon finding out whether or not there is any solid evidence of

pretext. Then they state it differently in stating "we evaluate whether any arguable evidence of pretext does not rise above speculation or conjecture so as to support the trial court's judgment notwithstanding the verdict. ..." -- Thus the Appellate Court in California engages in three separate standards in order to reach the decision that it made here in order to overturn the jury verdict and thus apply an unconstitutional standard violating SLAYTON's right to trial by jury in this case in order to reach a fabricated opinion.

The jury in the Pacific West case further found that the public did have an interest in the franchising of public television, and that the defendant's franchising process promoted the provisions of this kind of resource to a greater extent than would be provided in the absence of the process.

In the Pacific West case the United States District Court in its F.Supp. decision states:

> "Once the special verdicts are recorded the court then applies the law to the facts and enters judgment as provided in Federal Rule of Civil Procedure 58. ... Entry of judgment upon a jury's special verdict is subject not only to precedential guidelines but to constitutional constraints as well. ... The Seventh Amendment requires that if there is a view of the case which makes the jury's answers consistent, the court must adopt that view and enter judgment accordingly. ..."

The provisions of California Code of Civil Procedure §629 give the trial court an unfettered and an unbridled right to completely disregard the findings of a jury in any regard and give it the absolute right to be the thirteenth juror that can sway the jury one way or the other. It is submitted that no amount of judicial mental gymnastics can explain how and why this provision does not violate the Seventh Amendment to the United States Constitution.

This writer states this with all due respect to all prior decisions that have been made with reference to this matter but it all boils down to one consistent fact, the trial judge has the absolute right to overrule a jury in a civil case and to absolutely destroy a jury verdict if he or she does not agree with the jury's interpretation of the evidence. This is so unless this Court comes forward and provides sufficient guidelines so as to circumscribe this judicial power to a point where it is as it was originally intended in the Constitution, governed by the constitutional restraints as set forth in the Seventh Amendment to the United States Constitution or that amendment loses its entire effectiveness.

In Sandra Lee Neely, Petitioner, v. Martin K. Eby Construction Co. Inc., 386 U.S. 317, 18 L.Ed.2d 75, 87 S.Ct. 1072, Rehearing Denied 386 U.S. 1027, 18 L.Ed.2d

471, 87 S.Ct. 1366 (1967), after the trial judge had denied the defendant's motion for a directed verdict in a wrongful death action based on the theory of negligence and tried before a jury in the United States District Court for the District of Colorado, the jury awarded the plaintiff a verdict and the trial judge denied the defendant's motion for judgment notwithstanding the verdict or in the alternative for a new trial. On appeal to the Court of Appeals for the Tenth Circuit, the plaintiff urged that the jury's verdict be upheld but she did not request or present grounds for the granting of a new trial in the event that the verdict was not upheld. Contrary to said case, in the case at bar, plaintiff has presented much argument and much evidence from the record urging that the jury's verdict be upheld and has had no chance to request or present grounds for the granting of a new trial

since the trial court granted a new trial in the alternative in the event that the verdict was not upheld. Also in contrast to the Neely case, the Court of Appeals of the State of California has held in Appendix B hereto attached, that it need not go into the question of whether or not the trial court's granting of the motion for new trial in the alternative was proper and correct since it was upholding the judgment notwithstanding the verdict decision of said trial court. Although both parties had argued specifically with reference to the record which pertained to whether or not the trial court had exercised its powers correctly and properly in granting in the alternative said motion for new trial to the defendant employer.

In the Sandra Lee Neely case on appeal to the Court of Appeals for the Tenth Circuit, the plaintiff urged that the jury's verdict be upheld and did not

request or present grounds for the granting of a new trial in the event that it was not. The Court of Appeals held that the evidence of negligence and proximate cause was insufficient to go to the jury and reversed the District Court's judgment with instruction to dismiss the action. On certiorari this United States Supreme Court affirmed the Court of Appeals' actions. In an opinion by Justice White expressing the views of six members of the Court, it was held that the Court of Appeals had the power to direct the dismissal of the action and that because the grant of certiorari in the instant case was limited to the question of the Court of Appeals' power, no consideration could be given to the question whether the evidence of negligence and proximate cause was sufficient to go to the jury.

This case presents to this Court just the question of whether or not this Court

should grant certiorari based upon the usurpation of the power to review in minute detail the evidence that did go to the jury in the case below herein. This is not a question of whether or not the matter should have gone to the jury, it is a question of whether or not the judge has the right to completely review each and every item of evidence that went to the jury in reference to the jury's making of its decision herein. Both the Court of Appeals and the Supreme Court of the State of California have actually gone against their own decisions in this regard. In Hauter v. Zogarts (1975) 14 Cal.3d 104, 110 [120 Cal. Rptr. 781, 74 A.L.R.3d 1282], the California Supreme Court set forth the rules circumscribing the trial court's power to grant defendant's motion for judgment notwithstanding the verdict. It states as follows:

> "The trial judge cannot weigh the evidence [citation], or judge the credibility of witnesses [citation]. If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied [citations]. A motion for judgment notwithstanding the verdict of a jury may be properly granted only if it appears from the evidence, viewed in the light most favorable to the parties securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence or reasonable inferences to be drawn therefrom in support of the verdict the motion should be denied. ..."

What is particularly frustrating to any practitioner is the constant use of the law as set forth in precedential cases to justify the rulings of the Court that are made diametrically opposed to those rulings. After the Supreme Court of any state denies review of an Appellate Court that engages in such conduct the aggrieved party such as the petitioner herein is absolutely stymied. There is no place to go except possibly the United States

Supreme Court and the possibility of review there is minimal.

Here, as is obvious in Appendix B and in the refusal of the Supreme Court of the State of California to review, the Court of Appeals of the State of California has minutely reviewed each and every segment of the evidence presented in this seven and a half week trial the transcript of which was extremely costly [in excess of $12,000.00] and has literally paid no attention to the edict of the Hauter v. Zogarts case, supra. The Court of Appeals obviously considers evidence presented by the defendant as well as that presented by the plaintiff and considers both sides of the evidence in order to reach its conclusion that a political reason for committing bad faith in an employer-employee wrongful discharge situation is okay because that is laudable under "public policy" or "political motivation" under the guise that they are

seeking safety of nuclear power plants -- ludicrous.

It is for the above reason that this petitioner is seeking review of the code section under which this unfettered power to overrule juries is garnered by the judiciary of the state of California. It is a most impactive violation of civil rights to permit this to continue. The rule of the "thirteenth juror" must be circumscribed and the only court that can do it is the United States Supreme Court. If the Constitution does not prohibit an unabridged power under Section 629 of the California Code of Civil Procedure then the Courts of this state will replace juries in civil cases [and to this date they have].

Since in our case the Court of Appeals' decision to refuse to review the question of whether or not defendant was entitled to a new trial because of its decision that judgment notwithstanding the verdict should

be affirmed, we must ask the following adjunctive question. Did it deprive the plaintiff of a review of his right to a new trial in violation of the due process provisions of the United States Constitution [Fifth Amendment]? The adjunctive question to that question is does the Seventh Amendment to the United States Constitution deny to any judge, either state or federal, the power to set aside a jury's verdict without granting a new trial. [See Moran v. Washington Railway and Electric Co. (1931) 49 F.2d 679, 60 App. D.C. 155.]

The Pederson case above cited holds that where a verdict has been rendered for the plaintiff, the Court was without authority on a motion for new trial to render judgment for the verdict on the evidence notwithstanding the verdict. The elimination from this holding of the fact that the motion for judgment

notwithstanding the verdict or in the alternative for new trial had been granted, is of course explained by the early date of this Pederson decision which is in 1913. Had the moving party had legislation and a statute enabling it to make a motion in the alternative as was done in our case, it is still this writer's feeling that the Court would have said, there is no authority for the granting of a motion for judgment notwithstanding the verdict and new trial in the alternative, because to do so is to provide the Court with the vehicle with which to violate the plaintiff's rights to full due process and a jury trial. In this regard I think the following points should be considered:

Let's just visualize what the Court does in this instance. The Court actually states by such a decision wherein it grants both the judgment notwithstanding the verdict and the new trial in the

alternative, that if it has made a mistake or has committed error in granting the judgment notwithstanding the verdict, it then grants the new trial to give the defendant or the losing party the right to again try the case although a prima facie case had been established by the winning party. The Court eliminates from the winning party's arsenal, the right to due process on whether or not it is entitled to have a new trial of its own after the granting of a judgment notwithstanding the verdict. If the Appellate Court affirms as it did in our case, the judgment notwithstanding the verdict decision of the trial court, then the plaintiff has no chance to ask for a new trial although grounds may exist for it to have it because if the evidence was insufficient to sustain a verdict in favor of the plaintiff and against the defendant, then conversely that evidence might have been insufficient to

sustain a verdict in favor of the defendant as against the plaintiff. However, because the plaintiff has had no opportunity to make a motion for new trial because he won the case in the trial court, he cannot argue and cannot make a motion for new trial. In this way the statute is unconstitutional because it deprives the plaintiff of due process. See the Sandra Lee Neely case supra, and especially the dissents of Justices Fortas, Douglas and Black in this regard.

It seems almost obvious that Section 629 of the Code of Civil Procedure is incomplete and therefore unconstitutional. The reason for this is that it does not contain equal protection for both winning and losing parties in a situation involving the facts contemplated by the section. In a case such as ours where the plaintiff has prevailed in a jury trial, and the verdict has been rendered based upon seven and a

half weeks of testimony and evidence which admittedly by the Court of Appeals' opinion shows that there are logical inferences that could be drawn from the evidence under which the jury verdict itself could have been sustained, the trial court granted defendant's motion for judgment notwithstanding the verdict as well as in the alternative granted the defendant's motion for new trial. Plaintiff did not have an opportunity of course to make his own motion for new trial because he had to oppose the defendant's motions and to ask the Appellate Court to sustain the jury's verdict. Thereafter, plaintiff did argue against the granting of said motion for new trial as well as against the granting of judgment notwithstanding the verdict and was told by the Appellate Court that the Appellate Court did not even consider those arguments because of the fact they had affirmed the trial court's granting of the

judgment notwithstanding the verdict. Thus plaintiff had no chance at all to place before the Appellate Courts the question of whether or not he had sufficient grounds to ask for a new trial of his own. The code section does not provide for this contingency although this contingency could easily happen and does happen in most of the cases as it did in this one. The code section provides only in the instance where a directed verdict should have been granted for one party or the other and thus a motion for nonsuit perhaps should have been granted against the plaintiff, the Court has a chance to rectify its mistake after the verdict if it does not agree with the verdict and to set aside the trial by jury that resulted in a verdict for the winning party. There is no provision anywhere for a plaintiff in the situation such as that in which SLAYTON found himself to make a motion for new trial on his own and based

upon the mistakes that were made in the admission of evidence in the case which, if the plaintiff had lost, would have resulted in a basis or ground for the plaintiff's motion for new trial. In this way, the code section is definitely unconstitutional. The question of plaintiff's right to a new trial in the event that the evidence was not sufficient to sustain the trial court's or the Appellate Court's decision to grant judgment notwithstanding the verdict, occupies over half the plaintiff's briefs since the motion was made in the alternative and the Appellate Court did not consider same because of its statement in its opinion that it did not. In this regard then it must be manifest that the plaintiff has had no chance to present and to argue the motion for new trial in the event that judgment notwithstanding the verdict is granted or not granted because

of the peculiar wording of Section 629 of the California Code of Civil Procedure.

The type of jury trial guaranteed by the California Constitution is that which existed at common law, and the Legislature cannot abridge it. [Article 1, Section 16, of the California Constitution.]

In Taylor v. Louisianna (1975) 419 U.S. 522, 95 S.Ct. 692, 698, 42 L.Ed. 690, 698, the United States Supreme Court in deciding whether or not a jury should be a fair cross-section of the community, makes a statement which is most apropos in this case. The statement is as follows:

> "[A] 'fair cross-section of the community' on venires, panels or lists from which trial juries are drawn is a fundamental element of the constitutional right to a jury trial. ... The purpose of a jury is to guard against the exercise of arbitrary power -- to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. ... This

> prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large distinctive groups are excluded from the pool. ..."

Obviously the way the California judges are applying Section 629 of the California Code of Civil Procedure in this particular instance is most arbitrary and is against all that this counsel believes the right to jury trial stands for. It must be specifically delineated and set out by this Court in order to circumscribe the arbitrary power that has been taken by the state judiciary in this regard.

This counsel is not being disrespectful. After forty years of practice this counsel is most aware of the dignity that must be accorded to the courts and of this counsel's duty to refrain from any conduct or activity that would reflect upon the absolute dignity and authority of the courts of this land. However this counsel is also mindful of his duty to make

public rights that are guaranteed by the Constitution shine forth to the best of his ability and still maintain his responsibility and duties to both the court and the public. Therefore this Petition for Writ of Certiorari is being presented so that this Court can have the opportunity and the vehicle by which to enforce the constitutional rights as set forth in the Seventh Amendment of the United States Constitution as well as the Fifth and Fourteenth Amendments thereto, all within the four corners of this governing document upon which this country is based.

Justice Black in the Sandra Lee Neely case significantly states as follows in his dissent:

> "Petitioner and respondent both in their briefs on the merits and in their oral argument have vigorously and extensively addressed themselves to the question of whether the lower court was correct in holding that the petitioner's evidence of negligence and proximate cause was

insufficient to go to the jury. [Just as in our case both the trial court and the Court of Appeals after review of the record and evidence felt that the evidence was insufficient to have gone to the jury and that a directed verdict should have been granted as provided in Section 629 of the California Code of Civil Procedure and that this is the reason why the judgment notwithstanding the verdict was granted.] The Court however conveniently avoids facing this issue -- which if resolved in the petitioner's favor would completely dispose of this case -- by a footnote statement that this issue was not presented in the petition for certiorari nor encompassed by our order granting certiorari. [However in the case at bar the Appellate Court conveniently avoids facing this issue by stating that since they have granted the judgment notwithstanding the verdict, the question of new trial and its applicability is moot, and they do not even review the case from that standpoint.] Besides the fact that this seems to me to be an overly meticulous reading of the petition for certiorari and our order granting it, I see no reason for the Court's refusal to deal with an issue which is undoubtedly present in this case even though not specifically emphasized in the petition for certiorari. Although usually this Court will not consider questions not presented in the petition for certiorari,

> our Rule 40(1)(d)(2) has long provided that the Court at its option 'may notice a plain error not presented.' And the Court has frequently disposed of cases by deciding crucial issues which the parties themselves fail to present. See e.g., Brotherhood of Carpenters v. United States, 330 U.S. 395, 91 L.Ed. 973, 67 S.Ct. 775; Silber v. United States, 370 U.S. 717, 8 L.Ed.2d 798, 82 S.Ct. 1287; Boynton v. Virginia, 364 U.S. 454, 5 L.Ed.2d 206, 81 S.Ct. 182. **If, as I believe, the Court of Appeals was wrong in concluding that the evidence was insufficient to go to the jury, then its reversal of the jury's verdict was a violation of the Seventh Amendment and certainly this is the kind of plain constitutional error that this Court can and should correct.**
>
> **That the evidence was more than ample to prove both negligence and proximate cause is, I think, inescapably clear from even a cursory review of the undisputed facts in this record.**"
> [Emphasis, the writer's.]

In short, the Justice felt that for the Court of Appeals to hold on a record that had logical inferences of the plaintiff having sustained its burden in proving negligence and proximate cause [in our case it would have been pretext and sham with

reference to the firing of SLAYTON] it was a clear violation of the Seventh Amendment to deprive petitioner of a jury verdict rendered on that evidence. Justice Black is clear and undoubtedly correct in making the following statement with reference to the plaintiff who was in the same position as is SLAYTON in this case being accorded the opportunity to move for a new trial. He states:

> "We clearly indicated that the result would have been the same had the verdict loser, as had the respondent here, unsuccessfully move for a judgment N.O.V. in the trial court for in that case likewise the verdict winner would have had to wait until the Court of Appeals deprived him of his verdict before presenting his grounds for a new trial. [Just as in our case.] We specifically rejected a suggestion -- today accepted by the Court -- that the verdict winner should have to claim his right to a new trial in the Court of Appeals or lose it. ..." [Emphasis, the writer's.]

The good Justice was referring to the case of Cone v. West Virginia Pulp and

Paper Co., 330 U.S. 212, 91 L.Ed. 849, 67 S.Ct. 752.

CONCLUSION

The California courts have consistently held that if a prima facie case is proved from which logical inferences can be drawn showing other elements of the case, the Court is powerless to grant either motion for non-suit, directed verdict, or judgment notwithstanding the verdict. [Jones v. Hotchkiss, 147 Cal.App.2d 197, 305 P. 2d 129.] In addition to the above-described reasons it is imperative that this Court step in and stop the unbridled substitution of the way a trial court thinks or an Appellate Court thinks for the duly rendered verdict of a jury in a case such as the case at bar. While it is only a statement by the Second District of the Court of Appeal in the State of California in the Jones v. Hotchkiss case it is worthy of repeating same here. At page 134 of the

Pacific 2d citation, presiding Justice Shinn in said case in a concurring opinion states as follows:

> "I concur; but feel impelled to add a thought which comes to mind more often than it is expressed. I put it in the form of questions. Why do defense lawyers press for nonsuits when practically all the material facts are in evidence, instead of submitting the case on the merits, and why do trial judges grant nonsuits in doubtful cases when they are convinced that a verdict in favor of the plaintiff would be against the weight of evidence and that it would be their duty to grant a new trial? It should be clear from a study of the reported cases that the rule applicable to nonsuits operate strongly in favor of plaintiffs and that it precludes reviewing courts from sustaining judgments of nonsuit if the evidence would be legally sufficient to support a verdict or judgment for the plaintiff. However dubious a plaintiff's case may appear to a reviewing court, the functions of the jury must be respected and there can be no weighing of the facts beyond the inquiry whether the case of the plaintiff is entirely devoid of substantial support in the evidence. The frequency with which judgments of nonsuit are reversed should stand as a warning that too many of them are granted. ..."

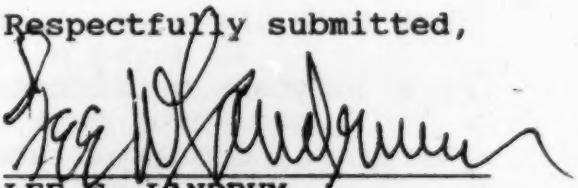
The basis of this petition for writ of certiorari is exactly the sentiment that was discussed by Justice Shinn in the Jones case. In the case at bar the evidence is admittedly overwhelming that there was a "political sham and pretext" which was involved in the reasons why BECHTEL fired SLAYTON, the petitioner herein. Apparently the logical inference that the Appellate Court drew in Appendix B hereto attached is the very reason why that Court reasoned that the jury verdict should be set aside by a judgment notwithstanding the verdict. Therefore, the Appellate Courts in California seem constrained to give lip service to the idea that a person is entitled to an unbridled trial by jury in a civil case under theSeventh Amendment to the United States Constitution and yet they interpret the statute under which they can grant judgment notwithstanding the verdict as being a completely segregated

constitutional reason why the courts can substitute their own interpretation and inferences from the evidence presented so as to reach a decision that is compatible with what the court feels should be the decision the jury notwithstanding.

It is for the reasons herein stated that this petitioner respectfully requests that his Petition for Writ of Certiorari to the United States Supreme Court be granted.

Dated: July 24, 1989

Respectfully submitted,



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[This counsel was admitted to the Supreme Court of the United States Bar by Certificate signed by John F. Davis, Clerk of the Supreme Court of the United States, dated April 7, 1969. Said Certificate is in full force and effect as of this date.]